

SENATE BILL 739
By Clabough

AN ACT to amend Tennessee Code Annotated, Title 47, Chapter 31, relative to enforcement of the Tennessee Tobacco Manufacturer's Escrow Fund Act of 1999.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 47, Chapter 31, is amended by adding sections 2 through 10 of this act as a new part thereto.

SECTION 2. As used in this part:

(1) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol," "lights," "kings," and "100s" and includes any use of a brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes;

(2) "Cigarette" has the same meaning as that term is defined in § 47-31-102(4);

(3) "Commissioner" means the commissioner of revenue;

(4) "Licensed agent" means a person who is authorized to affix tax stamps to packages or other containers or cigarettes under § 67-4-1006 or any person who is required to pay the tobacco tax imposed pursuant to § 67-4-1002.

(5) "Master settlement agreement" has the same meaning as that term is defined in § 47-31-102(5);

(6) "Non-participating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer;

(7) "Participating manufacturer" has the meaning given that term in section II(jj) of the master settlement agreement and all amendments thereto;

(8) "Qualified escrow fund" has the same meaning as that term is defined in § 47-31-102(6);

(9) "Tobacco product manufacturer" has the same meaning as that term is defined in § 47-31-102(9); and

(10) "Units sold" has the same meaning as that term is defined § 47-31-102(10).

SECTION 3.

(a) Every tobacco product manufacturer whose cigarettes are sold in this state whether directly or through a distributor, retailer, or similar intermediary or intermediaries shall execute and deliver on a form prescribed by the commissioner a certification to the commissioner and attorney general and reporter no later than April 30 of each year, certifying under penalty of perjury that, as of the date of such certification, such tobacco product manufacturer either is a participating manufacturer; or is in full compliance with § 47-31-103 including all quarterly installment payments required by Section 5(e).

(1) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update such list thirty (30) calendar days prior to any addition to or modification of its brand families by

executing and delivering a supplemental certification to the attorney general and commissioner.

(2) A non-participating manufacturer shall include in its certification:

(A) A list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year;

(B) A list of all of its brand families that have been sold in the state at any time during the current calendar year;

(C) Indicating by an asterisk, any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of such certification; and

(D) Identifying by name and address any other manufacturer of such brand families in the preceding calendar year.

The non-participating manufacturer shall update such list thirty (30) calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general and commissioner.

(3) In the case of a non-participating manufacturer, such certification shall further certify:

(A) That such non-participating manufacturer is registered to do business in the state or has appointed an agent for service of process and provided notice thereof as required by Section 4;

(B) That such non-participating manufacturer has:

(i) Established and continues to maintain a qualified escrow fund; and

(ii) Executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund;

(C) That such non-participating manufacturer is in full compliance with § 47-31-101 et seq. and this part, and any regulations promulgated pursuant thereto;

(D)

(i) The name, address, and telephone number of the financial institution where the non-participating manufacturer has established the qualified escrow fund required pursuant to § 47-31-103 and all regulations promulgated thereto;

(ii) The account number of such qualified escrow fund and sub-account number for the state;

(iii) The amount such non-participating manufacturer placed in such fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the attorney general to confirm the foregoing; and

(iv) The amount of and date of any withdrawal or transfer of funds the non-participating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to § 47-31-103 and all regulations promulgated thereto.

(4) A tobacco product manufacturer may not include a brand family in its certification unless:

(A) In the case of a participating manufacturer, such participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year, in the volume and shares determined pursuant to the master settlement agreement; and

(B) In the case of a non-participating manufacturer, such non-participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of § 47-31-103.

Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of § 47-31-103.

(5) The tobacco product manufacturer shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five (5) years, unless otherwise required by law to maintain them for a greater period of time.

(b) Not later than May 31, 2003, the commissioner shall develop and make available for public inspection a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection 3(a) and all brand families that are listed in such certifications (hereafter, the directory), except as noted below.

(1) The commissioner shall not include or retain in such directory the name or brand families of any non-participating manufacturer that fails to provide the required certification or whose certification the commissioner determines is not in compliance with Section 3(a)(2) and (3), unless the attorney general has

determined that such violation has been cured to the satisfaction of the commissioner.

(2) Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the commissioner concludes that, in the case of a non-participating manufacturer:

(A) Any escrow payments required pursuant to § 47-31-103 for any period for any brand family, whether or not listed by such non-participating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general; or

(B) Any outstanding final judgment, including interest thereon, for violation of § 47-31-103 has not been fully satisfied for such brand family and such manufacturer.

(3) The commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this part.

(4) Every licensed agent shall provide and update as necessary an electronic mail address to the attorney general for the purpose of receiving any notifications as may be required by this part.

(c) It shall be unlawful for any person to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory, or to sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

SECTION 4.

(a) Any non-resident or foreign non-participating manufacturer that has not registered to do business in the state as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the directory, appoint and continually engage without interruption the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this part and § 47-31-101 et seq., may be served in any manner authorized by law. Such service shall constitute legal and valid service of process on the non-participating manufacturer. The non-participating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of such agent to and to the satisfaction of, the commissioner and attorney general.

(b) The non-participating manufacturer shall provide notice to the commissioner and attorney general thirty (30) calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the attorney general of the appointment of a new agent no less than five (5) calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the non-participating manufacturer shall notify the commissioner and attorney general of such termination within five (5) calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

(c) Any non-participating manufacturer whose cigarettes are sold in this state, who has not appointed or engaged an agent as herein required, shall be deemed to have appointed the secretary of state as such agent and may be proceeded against in courts of this state by service of process upon the secretary of state; however, the appointment of the secretary of state as such agent shall not satisfy the condition precedent to having the brand families of the non-participating manufacturer included or retained in the directory.

SECTION 5.

(a) Not later than twenty (20) calendar days after the end of each calendar month, each licensed agent shall submit such information as the commissioner requires to facilitate compliance with this part, including, but not limited to, a list by brand family of the total number of cigarettes or, in the case of roll your own, the equivalent stick count for which the licensed agent affixed stamps during the previous calendar month or otherwise paid the tax due for such cigarettes. The licensed agent shall maintain, and make available to the commissioner, all invoices and documentation of sales of all non-participating manufacturer cigarettes and any other information relied upon in reporting to the commissioner for a period of five (5) years.

(b) The commissioner is authorized to disclose to the attorney general any information received under this part and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of this part. The commissioner and attorney general shall share with each other the information received under this part, and may share such information with other federal, state, or local agencies only for purposes of enforcement of this part, § 47-31-101 et seq., or corresponding laws of other states.

(c) The attorney general may require at any time from the non-participating manufacturer, proof from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with § 47-31-103 of the amount of money in such fund, exclusive of interest, the amount and date of each deposit to such fund, and the amount of each withdrawal from such fund.

(d) In addition to the information required to be submitted pursuant to Section 3 and this section, the commissioner may require a licensed agent or tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the

commissioner to determine whether a tobacco product manufacturer is in compliance with this part.

(e) To promote compliance with the provisions of this part, the commissioner may promulgate regulations requiring a tobacco product manufacturer subject to the requirements of section 3(a)(2) to make the escrow deposits required in quarterly installments during the year in which the sales covered by such deposits are made. The commissioner or attorney general may require production of information sufficient to enable the commissioner or attorney general to determine the adequacy of the amount of the installment deposit.

SECTION 6.

(a) In addition to or in lieu of any other civil or criminal remedy provided by law, if the commissioner has reasonable grounds to believe that a licensed agent or any other person has violated Section 3(c) or any regulation adopted pursuant to this part, the commissioner may revoke or suspend the license of the licensed agent in the manner provided by §§ 67-4-1006 and 67-4-1016, and in accordance with the Uniform Administrative Procedures Act, compiled in title 4, part 5. Each stamp affixed and each offer to sell cigarettes in violation of Section 3(c) shall constitute a separate violation. For each violation hereof, the commissioner may also impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or five thousand dollars (\$5,000) if the commissioner has reasonable grounds to believe that a violation of Section 3(c) or any regulations adopted pursuant thereto has occurred. Such penalty shall be imposed in the manner provided by § 67-4-1015 and in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, part 5. In the event of a conflict between the provisions of § 67-4-1015 or § 67-4-1016 and the Uniform Administrative Procedures Act, the provisions of the Uniform Administrative Procedures Act shall govern.

(b) Any cigarettes that have been sold, offered for sale, or possessed for sale in this state, or imported for personal consumption in this state, in violation of Section 3(c) shall be deemed contraband under title 67, chapter 4, part 10 and such cigarettes shall be subject to seizure and forfeiture as provided in such part, and all such cigarettes so seized and forfeited shall be destroyed and not resold.

(c) The attorney general, on behalf of the commissioner, may seek an injunction to restrain a threatened or actual violation of section 3(c), 5(a), or 5(d) by a licensed agent and to compel the licensed agent to comply with such subsections. In any action brought pursuant to this section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney's fees.

(d) It shall be unlawful for a person to sell or distribute cigarettes or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes, that the person knows or should know are intended for distribution or sale in the state in violation of section 3(c). A violation of this section shall be a Class B misdemeanor.

SECTION 7.

(a) If the commissioner elects not to include a brand family or tobacco product manufacturer in the directory or if the commissioner removes a brand family or tobacco product manufacturer from the directory, that action is subject to review in the manner provided by § 67-1-105 and the Uniform Administrative Procedures Act, compiled in title 4, part 5. In the event of a conflict between the provisions of § 67-1-105 and the Uniform Administrative Procedures Act, the Uniform Administrative Procedures Act shall govern.

(b) No person shall be issued a license or granted a renewal of a license to act as a licensed agent unless such person has certified in writing, under penalty of perjury, that such person will comply fully with this section.

(c) For the year 2003, if the effective date of this act is later than March 16, 2003, the first report of licensed agents required by section 5(a) shall be due thirty (30)

calendar days after such effective date; the certifications by a tobacco product manufacturer described in section 3(a) shall be due forty-five (45) calendar days after such effective date; and the directory described in section 3(b) shall be published or made available within ninety (90) calendar days after such effective date.

(d) In any action brought by the state to enforce this part, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney's fees.

(e) If a court determines that a person has violated this part, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the state treasurer for deposit in the state's general fund. Unless otherwise expressly provided, the remedies or penalties provided by this part are cumulative to each other and to the remedies or penalties available under all other laws of this state.

SECTION 8. The commissioner may promulgate regulations necessary to effect the purposes of this statute.

SECTION 9. If a court of competent jurisdiction finds that the provisions of this part and of the Tennessee Tobacco Manufacturer's Escrow Fund Act of 1999, compiled in title 47, chapter 31, part 1, conflict and cannot be harmonized, then such provisions of the Tennessee Tobacco Manufacturer's Escrow Fund Act shall control. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this act causes the Tennessee Tobacco Manufacturer's Escrow Fund Act to no longer constitute a qualifying or model statute, as those terms are defined in the master settlement agreement, then that portion of this part shall not be valid.

SECTION 10. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this act is for any reason held to be invalid, unlawful, or unconstitutional, such decision shall not affect the validity of the remaining portions of this act or any part thereof.

SECTION 11. This act shall take effect upon becoming a law, the public welfare requiring it.